UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

STEPHENS MEDIA GROUP – WATERTOWN, LLC	**Cases 03-CA-226225** **03-CA-227946**
and	
STEPHENS MEDIA GROUP – MASSENA, LLC	**Case 03-CA-227924**
and	
NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS – COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	

RESPONDENTS' REPLY BRIEF TO THE UNION'S ANSWERING BRIEF

Pursuant to Section 102.46(e) of the Rules and Regulations of the National Labor Relations Board, Respondents Stephens Media Group – Watertown, LLC ("SMG Watertown") and Stephens Media Group – Massena, LLC ("SMG Massena", and collectively, "SMG") file this Reply Brief to NABET-CWA's Answering Brief ("Answering Brief"). The National Association Of Broadcast Employees And Technicians – Communications Workers of America, AFL-CIO is hereinafter referred to as the "Union."

I. SMG COMPLIED WITH THE BOARD'S RULES.

SMG's Exceptions to the Administrative Law Judge's Decision ("Exceptions") and Brief on Exceptions to the Administrative Law Judge's Decision ("Brief") complied with the Board's rules. In § 10438.4 of the NLRB's Casehandling Manual, the NLRB explains with emphasis added:

Sec. 102.46(b), Rules and Regulations sets forth the format and requirements of

each exception filed and Sec. 102.46(c) addresses the format and substance of the brief in support. The format and requirements for cross-exceptions and any brief in support thereof are governed by the same considerations applicable to exceptions. Sec. 102.46(e), Rules and Regulations. These documents frame the issues presented to the Board for its consideration. The supporting brief, if filed, contains the argument and citation of authority and the exceptions shall not contain such argument and citations, unless no supporting brief is filed. Together, both documents should, at a minimum, make clear:

- Specifically, the questions of procedure, fact, law or policy to which exception is taken
- Where in the Administrative Law Judge's decision each excepted to item is found or discussed
- What transcript pages and/or exhibits support the argument being made
- Where a disputed ruling may be found in the Administrative Law Judge's decision or the transcript
- The reasons and citations of authority the party asserts to support its position

Broad general exceptions, which do not clearly identify the issues, are not acceptable. See Howe K. Sipes Co., 319 NLRB 30 (1995). For example, an exception claiming the ALJ failed to find a violation of Section 8(a)(1) or 8(b)(1)(A), without more, is insufficient. On the other hand, such an exception is sufficient if it identifies a specific complaint allegation the ALJ found without merit, or did not address, and, in tandem with the brief in support, contains the specificity described above. If no brief is filed, the supporting argument must be included in the exceptions.

The general purpose of the requirements set forth in the rules and regulations of the NLRB is to "frame the issues presented to the Board for its consideration." *Id.* SMG has provided the Board exactly that. SMG's Exceptions identify all portions of the ALJ's Decision to which SMG takes exception, including the grounds for the exceptions and references to page and line numbers in the Decision. 29 C.F.R. § 102.46(b)(2) provides the requirements for a brief in support of exceptions:

Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following:
(i) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.
(ii) A specification of the questions involved and to be argued, together with a

reference to the specific exceptions to which they relate.
(iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.

SMG's Brief contains precisely what the rules require, including but not limited to the arguments, authorities, record citations, disputed rulings of the ALJ as referenced by page and line number in the ALJ's decision, exhibit references, and hearing transcript page and lines numbers. The Union attempts to analogize SMG's Exceptions and Brief to the respondent in *Special Touch Home Care Services, Inc.*, but these matters are distinguishable. [Answering Brief, at p. 3]; 349 NLRB 759 (2007). In *Special Touch Home Care Services, Inc.*, the respondent filed 92-pages of exceptions and a 50-page brief. The General Counsel moved to strike the exceptions and brief, and the Associate Executive Secretary permitted the respondent leave to file exceptions and a brief conforming to the Board's rules. The respondent thereafter filed 38-pages of exceptions and a 73-page brief. The Board found the respondent's subsequent filing violated its rules due to (i) exceeding page limitations, and (ii) the exceptions containing arguments, despite being provided an opportunity to amend. *Id.*, at 759-760. For these reasons, the Board accepted the respondent's exceptions but rejected its brief. *Id.*, at 759. In this matter, SMG's Brief meets the page-limitation requirements and SMG's Exceptions do not contain any arguments, as required under the Board's rules.

Further, the Union cites to *JHP & Assocs.*, wherein the respondent filed exceptions and a brief in support that were not in compliance with the Board's rules. [Answering Brief, at p. 3]; 338 NLRB 1059 (2003) (Metta Electric). In *JHP & Assocs.*, the respondent's exceptions were "a bare list of page and line numbers encompassing almost every page and line of the judge's decision." The Board further found "the brief [did] not reference by precise citation the exceptions to which they relate." *Id.*, at 1059. Despite this noncompliance, the Board accepted

the exceptions and brief in support "to the extent that the brief has made discernible arguments that cite the record and the law." *Id.* (emphasis added). Again, such is not the case for SMG's Exceptions and Brief. As discussed above, SMG's Exceptions are not a "bare list of page and line numbers," and the Exceptions identify with grounds (but not arguments) all portions of the ALJ's Decision to which SMG takes exception. SMG's Brief has further made clear and discernable arguments citing the exceptions, the record, and the law. Thus, SMG's Exceptions and the Brief, in tandem, contain the specificity required in the Board's rules and regulations.

"The Board has discretion in determining compliance with its regulations..." *Outokumpu Stainless USA, LLC*, 365 NLRB No. 127, fn. 1 (2017). To the extent the Board finds SMG's Exceptions and Brief were somehow not in strict compliance with its rules and regulations, SMG respectfully requests the Board accept the Exceptions and Brief based upon their good faith and substantial compliance with the Board's rules. For example, in *Outokumpu Stainless USA, LLC*, the Board rejected the General Counsel's motion to strike exceptions due to an alleged "fail[ure] to designate the precise portion of the record relied upon" and the misidentification or failure to "identify the portion of the judge's decision to which objection is made." *Id.* The Board rejected this position and accepted the nonconfirming exceptions and brief due to the respondent's substantial compliance with Board rules. *Id.* In *Solutia, Inc.*, 357 NLRB 58, fn. 1 (2011), the respondent requested the Board to disregard the charging party's brief "because the arguments fail to reference the exceptions to which they relate." Again, the Board accepted the charging party's brief due to substantial compliance with Board rules. *Id.* In *Zurn Nepco*, 316 NLRB 811, fn. 1 (1995), the Board found "Although the General Counsel's exceptions do not comply in all particulars with Sec. 102.46(b), we accept them because the General Counsel's brief sufficiently designates the portions of the record that General Counsel relies on to support the

exceptions." *Id.*

As shown above, SMG's submissions comply with the Board's rules in that they clearly and articulately set forth which portions of the ALJ's decision, by grounds and page and line number, to which SMG takes exception. The Brief provided extensive arguments, authorities, and record citations in relation to its Exceptions, and the Brief more than sufficiently designates the portions of the record (and Exceptions) which formulate the bases for the arguments and authorities therein. The Union's argument for the Board to disregard the Exceptions based on non-compliance is therefore without merit.

In the alternative, and based upon SMG's good faith and substantial compliance with the Board's rules and regulations, SMG respectfully requests leave to file an amended Exceptions and Brief to address nonconformities, if any.

II. WITH THE EXCEPTION OF BORROWED OR CONTRADICTORY FACTUAL FINDINGS, SMG DID NOT FILE EXCEPTION TO THE ALJ'S FINDINGS OF FACT.

The Union argues that SMG "did not explain why the ALJ's findings of fact are erroneous." [Answering Brief, at p. 8]. Contrary to this mischaracterization, SMG does not seek to disturb the ALJ's findings of fact with the exception of certain factual findings that are not in or supported by the Decision or record. Rather, SMG primarily takes exception to the factual findings as they were applied by the ALJ to the ALJ's conclusions of law and remedies.

For instance, SMG took exception to the ALJ's finding that "Laverghetta's lack of responses correlated to 'fear,' and therefore the statements by Curry were coercive." [Brief, at p. 34; D. 37:29-32]. See Exception Nos. 52-54. This so-called "fear" was inferred and borrowed by the ALJ without testimony or evidentiary support. Other certain factual findings of the ALJ contradict themselves in the Decision. For instance, the ALJ found that "negotiations for a successor contract began in August 2018" (D. 2:5-7) but the Decision thereafter provided

extensive chronological detail of the parties' telephone and email negotiations for successive collective bargaining agreements in May and June 2018 (D. 5:8-7:9). See Exception No. 2. The ALJ's findings of fact that were either inferred/borrowed or contradicted the record were properly discussed, argued, and distinguished in SMG's Brief.

III. SMG TIMELY AND SUFFICIENTLY RAISED THE ISSUE OF WAIVER, AND EXCEPTION NO. 32 REGARDING WAIVER IS FULLY SUPPORTED IN THE RECORD.

The Union's argument that SMG failed to timely raise the issue of waiver by the Union in Exception No. 32 is without merit. [Answering Brief, at pp. 6-7]. As shown below, SMG timely raised waiver during the ALJ hearing and in the Post-Hearing Brief of Respondents Stephens Media Group-Watertown, LLC and Stephens Media Group- Massena, LLC ("Post-Hearing Brief"), and the arguments in support of Exception No. 32 are fully supported in the record.

SMG clearly indicated during the ALJ hearing and in its Post-Hearing Brief that the Union waived its right to bargain on layoffs by (i) being informed on numerous occasions in August 2018 that SMG desired to bargain over Article 5 in the successive collective bargaining agreement (the layoff provisions), (ii) the Union ignoring and/or refusing SMG's requests to bargain about Article 5 on August 15, 16, and 17, 2018, and (iii) on August 20, 2018, the Union continuing to ignore and/or reject SMG's request to bargain on layoffs by cloaking its waiver as a bad faith and regressive bargaining proposal. [Post-Hearing Brief, at pp. 6-9; Tr. 349:20-355:18, 705:13-21]; see also *Taft Coal Sales & Assocs.*, 360 NLRB 96, 100 (2014) ("A waiver can be gleaned from... conduct (i.e.,... action or inaction)"). SMG's argument in support of waiver was raised during the ALJ hearing and in the Post-Hearing Brief, for instance, through the testimony of Michael J. King, attorney and negotiator for SMG.

King testified at the ALJ hearing in regards to the parties' first day of face-to-face bargaining on August 15, 2018:

A. [W]e quit with the understanding that we were going to get a proposal first thing in the morning, as it reflected, section 5 of the collective bargaining agreement.

Q. Okay. And what does section 5 relate to?

A. That's the provision that talks about layoffs.

[Tr. 331:10-15; R-1, p. 197-200]; *see also* Post-Hearing Brief, at pp. 6-7 ("Other than reject SMG's proposed changes to Article V, however, Gabalski's[1] [August 15, 2018] email did not include a counterproposal for the layoff clause").

King testified as follows about the second day of face-to-face bargaining:

A. [T]he way I would describe the day is that we would -- we would grab one or two of these issues. We would talk about them. We would make progress. Then the Company would try to steer the discussion back to section 5, and, well, we're going to have something for you on that here shortly. Let's talk about this. And so then we would go there with them, and we would talk about another issue. And we would make some progress. And then the Company would try to steer the -- the discussion back to section 5, and the response would be, we're working on it. We're going to get you something. So that's kind of how the day went.

...

Q. Okay. Now, on the evening of the 16th, do you and Mr. Gabalski have a discussion about the Union getting you something else on the morning -- on Thursday?

A. Well, that discussion began late morning on ... the 16th. It was continued into the afternoon. All right? So we were constantly asking for a proposal on section 5, big sticking point, and constantly being told something's coming.

...

Q. ... what was the Union's proposal on the Article 5, dealing with layoffs?

A. There wasn't one.

Q. Excuse me?

A. There wasn't one.

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[1] Ronald Gabalski was the Union's primary negotiator.

Q. Okay. And yet, had you continued to talk about that as a group -- about Article 5?

A. Well, I mean, as I said, I -- my view of it was that, from the Company's standpoint, I continued to try to steer the discussion back to it. And the responses that we got consistently were, we're working on something. And so, you know, there was a promise first that we were going to have it the morning of the second day, then the afternoon of the second day, and then that continued on.

[Tr. 339:17-340:3; 342:10-16; 344:17-345:5]; *see also* SMG's Post-Hearing Brief, at p. 7 ("King also continued to request repeatedly that the Union make a counterproposal on Article V... Despite its promise to do so the Union offered no counter proposal to Article V on the 16th").

On the third and final day of the parties' face-to-face bargaining, August 17, 2018, despite SMG's repeated demands to bargain on the layoff provisions, Gabalski advised King that the Union would issue a "comprehensive proposal ... with regard to Article 5." [Tr. 350:4-22]. The Union submitted no proposal relating to Article 5 on August 17, 2018. [Tr. 350:23-25]. Then, after Alan Walts appeared late to the August 17, 2018 bargaining session, the Union returned at 1:00 P.M. and advised SMG without explanation that it would not present their so-called proposal to SMG that day. [Tr. 354:9-17; Post-Hearing Brief, at pp. 7-8]. In response, King said to Gabalski:

> [W]e've been here for three days and we have gotten no proposal on Article 5, other than their continued assurances that they understand -- understood the needs of the Company. That they understood that this could be beneficial to both sides. And they were going to get us something that in their words we were happy with.
> ...
> I've to go back and report to my client that, you know, we've made some progress on the peripheral but we've spent three days and basically never got through the issue.

[Tr. 355:1-18]; *see also* SMG's Post-Hearing Brief, at p. 8. Gabalski again assured King a comprehensive package proposal would thereafter be submitted on August 20, 2018, which would address Article 5. [Tr. 355:7-24; D. 11:21].

As shown above and as well-documented at the ALJ hearing through witness testimony and in SMG's Post-Hearing Brief, SMG timely and appropriately raised Exception No. 32.

SMG's Exception No. 32 is also fully supported in the record and in the Brief. The Board in *Bottom Line Enterprises* noted that waiver of a right to bargain can be found if the union was on "notice of the proposed change and was given that notice sufficiently in advance of implementation to permit meaningful bargaining." 302 NLRB 373, 374 (1991). However, when parties are engaged in negotiations, an employer must not implement unilateral changes until impasse. An exception to this rule is "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining." *Id.* The Union takes the unsupported position that the parties were engaged in bargaining on the issue of layoffs, and therefore SMG's waiver argument is not available. [Answering Brief, at p. 7]. The Union fails to recognize that SMG's argument of waiver was on the basis of the Union's outright refusal to bargain on the topic at the August 2018 bargaining sessions. Further, rather than addressing SMG's stated needs, the Union in bad faith submitted a regressive bargaining proposal on August 20, 2018, as it relates to Article 5, likely in an attempt to preemptively avoid an argument of waiver by SMG. [Brief, at pp. 25-26; R-1, p. 239-42; Tr. 355:22-357:20]. The ALJ noted the Union's August 20 package proposal was "not the 'huge concessions' Gabalski believed them to be," and that the ALJ understood King's frustration with the substance of the proposal. [D. 23:9-14]; *see also* Post-Hearing Brief, at pp. 8-9 (after refusing to move off the regressive proposal submitted August 20, "[t]he Union made no new proposals regarding Article V and gave no indication that further discussions would be anything other than futile"). As argued herein and in SMG's Brief, the parties had not "engaged" in negotiations on layoffs

because the Union refused to discuss the topic. [Brief, at p. 26] ("… the Union repeatedly rejected SMG's attempts to bargain on the layoff issue").

In the alternative, the Union's constant avoidance of bargaining on layoffs falls within the exception provided in *Bottom Line Enterprises*. SMG put the Union on notice of its intent to bargain on layoffs in June 2018 (Brief, at pp. 2-3) and immediately prior to face-to-face bargaining (*id.*, at 4; D. 22:38-23:3) sufficient to permit meaningful bargaining on the topic. Brief, at pp. 25-26. The Union's actions/inactions resulting in no meaningful bargaining on layoffs permitted SMG to implement unilateral changes after its lawful declaration of impasse.

Respectfully submitted,

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STATEMENT OF SERVICE

The undersigned certifies that on the 15th day of May, 2020, the foregoing was e-filed with the National Labor Relations Board and a true and correct copy was emailed to the following:

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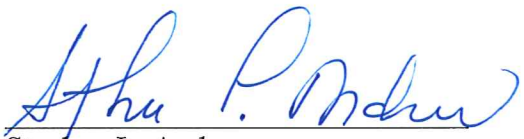
By: 
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